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Public Prosecutor v Umapathi a/l Ganesan

B HIGH COURT (MELAKA) — CRIMINAL TRIAL NOS MA-45A–05 & 06–12 OF 2016
MOHD RADZI ABDUL HAMID J
21 AUGUST 2023

C *Criminal Law — Dangerous drugs — Trafficking — Accused was convicted of trafficking in 99.99g of heroin — Amount of drugs was almost seven times more than the statutory minimum under Dangerous Drugs Act 1952 ('DDA') — Whether prior to Abolishment of Mandatory Death Penalty Act 2023 ('Act 846') accused would have received mandatory death penalty — Whether pursuant*
D *to Act 846 Court on finding mitigating factors outweighed the aggravating factors exercised discretion to sentence accused to life imprisonment and 15 strokes of whipping*

E The accused in this case was convicted after trial in May 2023 on four offences under the Dangerous Drugs Act 1952 ('the DDA') and one offence under the Poisons Act 1952. The DDA offences were for trafficking in 94.99g of heroin and possession of 10.15g of monoacetylmorphines and 4.21g of methamphetamine. The Poisons Act offence was for possession of phenazepam. According to the prosecution's case, the drugs were found in a
F plastic bag which the accused threw into some bushes by a roadside when two police officers who were on patrol duty were approaching him after they found him behaving suspiciously near a parked car. Since the trafficking offence carried the mandatory death penalty at the material time, sentencing for all the offences was postponed until after the Abolishment of Mandatory Death
G Penalty Act 2023 ('Act 846') came into force in July 2023. After various sentences were handed down for the other offences, the court dealt with the trafficking offence in respect of which the accused, in invoking Act 846, pleaded to be spared the death penalty in favour of a sentence of life imprisonment and 12 strokes of whipping instead, based on the following
H mitigating factors — that he was a first offender and was only 25 years old when he was arrested (the offence was committed in 2015), that he did odd jobs to support his family comprising his mother and a sibling, that although the amount of heroin involved was high, no agent provocateur was involved in the case and he was not caught in the act of selling the heroin and had fully
I co-operated with the police. The prosecution pressed for a deterrent sentence to reflect the seriousness of the offence and in the public interest.

Held, sentencing the accused to life imprisonment and 15 strokes of whipping for the trafficking offence:

(1) After hearing the accused and the prosecution, the court found that the mitigating factors in favour of passing a life imprisonment sentence outweighed the aggravating factors. Although the amount of heroin was almost seven times more than the statutory minimum under s 37(da) of the DDA, the court took into account the fact that the accused was not caught in the act of selling dangerous drugs, that he acted alone, that there was no involvement of an agent provocateur, that he was not caught in the act of processing or manufacturing dangerous drugs and that he had co-operated with the police at the time of his arrest. Together with the other mitigating factors and in view of the spirit and intent of Act 846 — which was to preserve life — the instant case was one where the exercise of the court's discretion to pass a sentence of life imprisonment and whipping of 15 strokes was justified and commensurated with the facts of the offence (see paras 19 & 26).

(2) With the abolishment of s 39B(2A) of the DDA by Act 846, the court was now no longer bound only by the conditions stated in that provision to enable it to pass a sentence of life imprisonment. The power of the court was now enlarged to allow it to consider all other factors and to decide whether, in any given case, the accused should be sentenced to death or be given life imprisonment with a minimum of 12 strokes of whipping. Although s 39B(2A) had been abolished, the factors that were stated therein were not only available to the accused as mitigating factors to seek a sentence of life imprisonment but the opposite of each of those factors could at the same time amount to aggravating factors which the prosecution could rely upon to seek the death penalty (see paras 15–18).

(3) Since the spirit and intent of Act 846 was to preserve life, this court took the view that unless the aggravating factors in any given case were exceptionally serious and outweighed the mitigating factors, life imprisonment and whipping should be the preferred sentence under s 39B(2) of the DDA (see para 20).

(4) The DDA did not define the meaning of life imprisonment and Act 846 did not specifically define that phrase in the context of s 39B(2) of the DDA. The Court of Appeal in *Kannan a/l Rama Chenderan v Pendakwa Raya* [2019] MLJU 1680 held that s 39(2A) of the DDA, which provided for the sentence of life imprisonment, should be read with s 3 of the Criminal Justice Act 1953, as amended in 2007, to mean a sentence of 30 years in prison. That decision and rationale should similarly apply to s 39B(2) of the DDA. The legislators must have intended for life imprisonment to remain as 30 years as defined in the amended Criminal Justice Act and not as 'not less than 30 years and not more than 40 years' as stipulated by Act 846 in the amendments that it made to various other laws (see paras 28–30).

A **[Bahasa Malaysia summary**

Selepas perbicaraan pada Mei 2023, tertuduh di dalam kes ini disabitkan atas empat kesalahan di bawah Akta Dadah Berbahaya 1952 ('ADB') dan satu kesalahan di bawah Akta Racun 1952. Kesalahan dibawah ADB adalah
B mengedar 94.99g heroin, memiliki 10.15g monoacetylmorphines dan 4.21g syabu. Tertuduh juga disabitkan di bawah Akta Racun kerana memiliki phenazepam. Menurut kes pendakwaan, dadah itu dijumpai di dalam beg plastik yang dibuang oleh tertuduh ke dalam semak di tepi jalan apabila dua anggota polis yang bertugas membuat rondaan menghampirinya selepas
C mendapati dia berada di dalam keadaan yang mencurigakan berhampiran sebuah kereta yang diparkir. Oleh kerana kesalahan pengedaran tertakluk kepada hukuman mati mandatori pada masa yang material, hukuman bagi semua kesalahan itu ditangguhkan sehingga selepas Akta Pemansuhan Hukuman Mati Mandatori 2023 ('Akta 846') berkuat kuasa pada Julai 2023.
D Selepas pelbagai hukuman dijatuhkan bagi kesalahan lain, mahkamah telah menjatuhkan hukuman untuk kes pengedaran yang mana tertuduh dengan menggunakan Akta 846, memohon untuk dikecualikan daripada hukuman mati. Mahkamah kemudiannya menjatuhkan hukuman penjara seumur hidup dan 12 sebatan, berdasarkan faktor mitigasi berikut — bahawa dia adalah
E pesalah pertama dan hanya berusia 25 tahun ketika dia ditangkap (kesalahan itu berlaku pada 2015; dia melakukan pelbagai kerja untuk menyara keluarganya, iaitu ibu dan adik-beradiknya; walaupun jumlah berat heroin yang terlibat adalah tinggi, tiada ejen provokatur di dalam kes itu dan dia tidak ditangkap ketika menjual heroin dan telah bekerjasama sepenuhnya dengan
F polis. Pihak pendakwaan memohon hukuman berat sebagai pencegahan bagi mencerminkan keseriusan kesalahan itu dan demi kepentingan awam.

Diputuskan, menjatuhkan hukuman penjara seumur hidup dan 15 kali sebatan untuk kesalahan pengedaran dadah kepada tertuduh:

G (1) Selepas mendengar hujahan tertuduh dan pihak pendakwaan, mahkamah mendapati faktor mitigasi yang memihak kepada pelaksanaan hukuman penjara seumur hidup melebihi faktor pemberatan hukuman. Walaupun jumlah berat heroin adalah hampir tujuh kali ganda lebih tinggi daripada jumlah minimum yang ditetapkan
H di bawah s 37 (da) ADB, Mahkamah mengambil kira fakta bahawa tertuduh tidak ditangkap ketika menjual dadah berbahaya, dia bertindak secara sendirian, tiada penglibatan ejen provokatur, dia tidak ditangkap ketika memproses atau menghasilkan dadah berbahaya dan dia telah bekerjasama dengan polis ketika masa penangkapannya. Bersama
I faktor-faktor mitigasi yang lain dan setelah meneliti tujuan Akta 846 — iaitu untuk memelihara nyawa — kes ini tertakluk kepada budi bicara mahkamah untuk menjatuhkan hukuman penjara seumur hidup dan sebatan 15 adalah wajar dan setimpal dengan fakta kesalahan (lihat perenggan 19 & 26).

(2) Dengan pemansuhan s 39B(2A) ADB oleh Akta 846, mahkamah kini tidak lagi terikat hanya dengan peruntukan itu untuk membolehkan hukuman penjara seumur hidup dijatuhkan. Kuasa mahkamah kini diperluaskan untuk membolehkan semua faktor lain dipertimbangkan dan memutuskan sama ada, dalam mana-mana kes tertentu, sama ada tertuduh harus dijatuhi hukuman mati atau diberi hukuman penjara seumur hidup dengan minimum 12 sebatan. Walaupun s 39B(2A) telah dimansuhkan, faktor-faktor yang dinyatakan bukan sahaja membolehkan tertuduh menggunakannya sebagai faktor mitigasi untuk mendapatkan hukuman penjara seumur hidup, namun faktor-faktor sebaliknya juga boleh digunakan pihak pendakwaan sebagai pemberatan hukuman (lihat perenggan 15–18).

(3) Oleh kerana tujuan Akta 846 adalah untuk memelihara nyawa, mahkamah ini berpandangan bahawa melainkan faktor-faktor pemberatan dalam mana-mana kes tertentu adalah sangat serius dan melebihi faktor mitigasi, penjara seumur hidup dan sebatan hendaklah diberi keutamaan untuk hukuman di bawah s 39B(2) ADB (lihat perenggan 20).

(4) ADB tidak mentakrifkan maksud penjara seumur hidup dan Akta 846 tidak secara khusus mentakrifkan frasa itu dalam konteks s 39B(2) ADB. Mahkamah Rayuan di dalam kes *Kannan a/l Rama Chenderan v Pendakwa Raya* [2019] MLJU 1680 memutuskan bahawa s 39(2A) ADB, yang memperuntukkan hukuman penjara seumur hidup, harus dibaca bersama s 3 Akta Keadilan Jenayah 1953, yang dipinda pada tahun 2007, yang bermaksud hukuman penjara selama 30 tahun. Keputusan dan rasional itu juga terpakai kepada s 39B(2) ADB. Penggubal undang-undang semestinya berniat untuk hukuman penjara seumur hidup kekal selama 30 tahun seperti yang ditakrifkan dalam Akta Keadilan Jenayah yang dipinda dan bukannya 'tidak kurang dari 30 tahun dan tidak lebih dari 40 tahun' seperti yang ditetapkan oleh Akta 846 yang meminda pelbagai undang-undang lain (lihat perenggan 28–30).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (refd)

Bebou Akpo Bouraima lwn Pendakwa Raya [2017] MLJU 477; [2017] 1 LNS 511, CA (refd)

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83; [1981] 1 LNS 139, FC (refd)

Chan Wei Loon v PP and another appeal [2021] 4 MLJ 660; [2021] 6 CLJ 623, FC (refd)

Kannan a/l Rama Chenderan v Pendakwa Raya [2019] MLJU 1680; [2019] 1 LNS 1938, CA (refd)

Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277; [2020] 8 CLJ 147, FC (refd)
Mohamad Fauzi bin Ridzwan & Anor v PP [2006] 2 MLJ 15; [2006] 1 CLJ 478, CA (refd)
Muhammad Lukman bin Mohamad v PP [2021] 4 MLJ 494; [2021] 7 CLJ 524, CA (refd)
Obieguo Emmanuel Chukwunanu v PP [2018] 1 LNS 1089; [2018] MLRHU 849, HC (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC
PP v Aris bin Mohd Nor [2019] MLJU 1136; [2019] 1 LNS 1555, CA (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119; [1982] CLJ Rep 285, FC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256; [1976] 1 LNS 102 (refd)
PP v Mohd Fazelan bin Md Khuzeh [2015] 6 MLJ 688; [2015] 9 CLJ 221, CA (refd)
PP v Shahrul Azuwan bin Adanan & Anor [2013] 8 MLJ 70; [2013] 2 CLJ 686, HC (refd)
PP v Saifulzainizam bin Mat Nasir [2021] 5 MLJ 265; [2021] 1 LNS 1074, CA (refd)
PP v Khairil Anwar bin Abdul Rahim [2016] 3 MLJ 458; [2016] 1 LNS 403, HC (refd)
PP v Morah Chekwube Chukwudi [2017] MLJU 958; [2017] 1 LNS 864, CA (refd)
PP v Muhammad Faiz bin Fazil Mahmud & Anor [2016] 5 MLJ 476; [2016] 1 LNS 523, CA (refd)
Pendakwa Raya lwn Ramakrishnan a/l Subramaniam dan lain-lain [2013] 2 MLJ 549; [2012] 9 CLJ 443, CA (refd)
Tia Ah Leng v PP [2004] 4 MLJ 249; [2005] 5 AMR 93; [2004] 4 CLJ 77, CA (refd)
Wjchai Onprom v PP [2006] 5 MLJ 415; [2006] 3 CLJ 724, CA (refd)

Legislation referred to

Abolishment of Mandatory Death Penalty Act 2023 s 54
Arms Act 1960
Criminal Justice Act 1953 s 3
Dangerous Drugs Act 1952 ss 2, 12(2), (3), 37(da), 39(2A), 39B(1), (2), (2A), (2B)
Firearms (Increased Penalties) Act 1971
Kidnapping Act 1961
Poisons Act 1952 s 30(3), (5)
Strategic Trade Act 2010

Mohd Asri bin Abd Rahman Sidik (with Mohd Nabilalif bin Mohd Rosli) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Paul Krishnaraja a/l Selladurai (with Amy Chong Chai Ling) (Paul, Amy Chong & Assoc) for the accused.

Mohd Radzi Abdul Hamid J:

INTRODUCTION

[1] This is the grounds of judgment on sentencing following four convictions against the accused ('convicted accused') at the end of defence case under the Dangerous Drugs Act 1952 ('the DDA') and the Poisons Act 1952. He was convicted for offences under s 39B(1) read with s 39B(2) for the trafficking of 94.99g heroin ('first conviction'), s 12(2) read with s 39(2A) for the possession of 10.15g monoacetylmorphines ('second conviction') and s 12(2) read with s 12(3) for the possession of 4.21g methamphetamine ('third conviction') under the DDA, and s 30(3) read together with s 30(5) of the Poisons Act 1952 for the possession of phenazepam ('fourth conviction').

[2] This court convicted the accused on 23 May 2023. At the request of learned counsel for the accused, absent objection from the prosecution, the passing of sentence under s 39B(2) was deferred until after the amendments under the DDA pursuant to the Abolishment of Mandatory Death Penalty Act 2023 ('Act 846') took effect. The sentencing for all the remaining convictions was also deferred to the same date.

[3] Pursuant to the Federal Government Gazette PU(B) 229, Act 846 came into effect on 4 July 2023. The hearing for sentencing on all convictions was fixed on 14 August 2023.

[4] At the end of the hearing, this court sentenced the accused to two years imprisonment and three strokes of whipping under the second conviction, six months imprisonment under the third conviction and six months imprisonment under the fourth conviction. This grounds deals with the sentencing under the first conviction.

BACKGROUND

[5] The charge under s 39B(1) read as follows ('charge'):

> Bahawa kamu pada 19.08.2015 jam lebih kurang 5.30 petang, di tepijalan, Kampung Paya Rumput Dalam, Paya Rumput, di dalam daerah Melaka Tengah, di dalam Negeri Melaka telah mengedar dadah berbahaya jenis heroin seberat 94.99 gram. Oleh itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[6] The facts of this case showed that two police officers were riding on motorcycles travelling along the road at Kg Paya Rumput Dalam when they saw the convicted accused standing next to a car that was parked at the side of

the road. The police officers stopped after seeing him behaving suspiciously. As they were approaching the convicted accused, they saw him throwing a black plastic bag into some bushes. A search was done and the police found a black plastic bag containing dangerous drugs that are the subject matter of the charge. The dangerous drug heroin was found packed in six packets.

SUBMISSIONS

Mitigation

[7] In his plea of mitigation for the convicted accused, learned counsel stated that the accused was a first offender, he was 25 years old of age at the time of arrest, he has a mother and a sibling and he did odd jobs to support the family. Although the amount of heroin was high that is 94.99g, the facts of the case showed that there was no involvement of an agent provocateur, he had given full cooperation to the police and he was not caught in the act of selling dangerous drugs. Based on those reasons, it was pleaded on behalf of the convicted accused that the death sentence is not appropriate to be passed in this case and that this court should instead sentence the convicted accused to life imprisonment and the minimum of 12 strokes of whipping.

By the prosecution

[8] The deputy public prosecutor appealed for a deterrent sentence commensurate with the seriousness and gravity of the offence. He further submitted that drug abuse has a serious impact on society and therefore sentence should reflect the seriousness of the offence in the interest of the public.

CONSIDERATION BY THIS COURT

Judicial view on drugs related offences

[9] The courts have consistently taken a strong and abhorrent view on drug related offences. In the Court of Appeal decision of *Tia Ah Leng v Public Prosecutor* [2004] 4 MLJ 249; [2005] 5 AMR 93; [2004] 4 CLJ 77, Mokhtar Sidin JCA speaking for the court stated:

> 9. It is true that the general rule is, when imposing a sentence, the court should take into consideration the fact that an accused person who has pleaded guilty be given certain credit and discount, but we are of the view that there are exceptions to this rule. In our opinion, one of these are the offences under the Dangerous Drugs Act 1952. The Government and the Legislature have taken very serious views in the abuse of usage of dangerous drugs. Drug addictions are rampant and the Government as well as the Legislature have tried to curb these addictions especially amongst youths but met with little success. Death sentences and heavy penalties

have been introduced but we find drug addicts everywhere. The addiction to drugs have led to other offences such as thefts, burglary and snatch thefts. Some of these offences lead to serious consequences. We have read in the newspapers that some drug addicts have gone to the extent of hurting their own families such as their mothers, sisters and grandmothers in order to get some money to purchase the drugs to support their addictions. Recently, a woman died when a snatcher snatched her handbag and she was dragged together with the handbag some distance away and as a result of that she died.

10. In our view, the source of all these evils are the drug traffickers and the drug peddlers. They are the ones who have been trafficking, selling and peddling the drugs to those drug addicts. It is public knowledge that the return in this type of business is very lucrative.

[10] Therefore, in deciding the appropriate sentence in drug offences, the court must take a strong stand against offenders by applying a deterrent approach to sentencing subject to the facts and circumstances of mitigation presented by the convicted accused. As said by Abang Iskandar bin Abang Hashim JCA (as His Lordship then was) in *Public Prosecutor v Muhammad Faiz bin Fazil Mahmud & Anor* [2016] 5 MLJ 476; [2016] 1 LNS 523:

[14] Uppermost on our mind when dealing with this kind of an appeal is the factor of public interest. As is trite, criminal law is publicly enforced and the reason underlying that policy has been that a crime must be dealt with in such a way that would-be offenders would be deterred from committing similar offence. Granted that rehabilitation may also be a relevant factor to be considered in deserving cases, the court invariably will lean in favour of meting out a deterrent sentence taking into account the kind of offence that was committed by the offender and the rampancy of such an offence. Having considered those factors, the court will then see what the trend on sentencing for similar kind of offence that was being considered on appeal would be like. Having said that, the court is well aware that there is no such thing as a 'one size fits all' kind of sentence for all offences. The law provides for a range of sentence within which the court is empowered to mete out an appropriate sentences depending on the relevant factors as the circumstances of the case may present (see generally, the case of *R v Ball* [1951] 35 Cr App R 164 the oft-cited judgment of Hilbery J).

General statement on mitigating and aggravating factors

[11] Harmindar Singh JCA (as His Lordship was then) in delivering the judgment of the Court of Appeal in *Public Prosecutor v Khairil Anwar bin Abdul Rahim* [2016] 3 MLJ 458; [2016] 1 LNS 403 said:

In drug cases, the mitigating factors that can usually be taken into account are a guilty plea, being a first offender or a young offender. The aggravating factors usually involve a consideration of the gravity of the offence, the type of drugs involved and the weight of the drugs. These considerations are by no means

exhaustive as mitigating or aggravating factors. The paramount consideration in the end is public interest which may vary according to the circumstances of each case.

[12] In the oft-quoted Court of Appeal decision in *Public Prosecutor v Morah Chekwube Chukwudi* [2017] MLJU 958; [2017] 1 LNS 864 the court had set out a list of circumstances that can amount to mitigating factors. They include:

(a) the gravity or severity of the facts constituting the offence;

(b) the circumstances in which it was committed;

(c) the rampancy of such offence in the area;

(d) the offender's previous record;

(e) the offender's contribution and support to his family members;

(f) the offenders means;

(g) the effect of conviction and sentence on his job opportunities;

(h) the age and health of the accused;

(i) whether it is his first offence;

(j) whether the accused had cooperated with the police after the commission of the offence;

(k) whether the accused had pleaded guilty;

(l) status of the accused;

(m) whether there was violence during the crime; and

(n) public interest.

Amendments to s 39B of the DDA

[13] Before delving into the merits of the each party's arguments, it would be necessary to firstly touch upon the recent amendments made with regards to the abolishment of the death sentence pursuant to Act 846.

[14] Now, despite that the Preamble to Act 846 states the Act is '... an Act to amend the Penal Code, the Firearms (Increased Penalties) Act 1971, the Arms Act 1960, the Kidnapping Act 1961, the Dangerous Drugs Act 1952, the Strategic Trade Act 2010 and the Criminal Procedure Code in order to abolish the mandatory death penalty, to vary the sentence relating to imprisonment for natural life and whipping, and to provide for matters connected therewith', yet the death penalty remains as one of the two sentences that can be meted out under s 39B(2), the other being imprisonment for life and whipping. Section 54 of Act 846 made changes to only two aspects of s 39B. Firstly, it

reduced the minimum number of whippings from 15 to 12 strokes, and secondly, it abolished ss 39B(2A) and (2B) with regards to the statutory grounds permitting the court's exercise of discretion to pass a life imprisonment sentence together with whipping instead of death.

[15] Notwithstanding that the death penalty under s 39B(2) remains unaffected by Act 846, the abolishment of s 39B(2A) and (2B) brought about significant changes to the court's power in passing sentences. The abolishment of s 39B(2A) effectively removed the 'unless' effect of that provision, where unless the conditions in s 39B(2A) can be satisfied, that is:

(a) there was no evidence of buying and selling of a dangerous drug at the time when the convicted person was arrested;

(b) there was no involvement of an agent provocateur;

(c) the convicted person's role was restricted only to transporting, carrying, sending or delivering dangerous drugs; and

(d) the convicted person has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia then there is no sentence other than the mandatory death sentence that can be meted out by the court,

then the court would have no choice but to pass the death sentence.

[16] By removing s 39B(2A), the statutory limits to the conditions that can justify the exercise of the court's discretion in passing a sentence of life imprisonment have now been removed. The power of the court is now enlarged to allow it to consider all other factors in exercising its discretion to pass a sentence of imprisonment for life and not be limited only to those grounds that were previously statutorily provided in s 39B(2A). The current law now places total discretion in the hands of the court to decide whether, in any given case, a convicted person's life shall terminate at the gallows or spared under a life imprisonment with a minimum of 12 strokes of whipping.

[17] Although s 39B(2A) is now abolished, it is this court's view that a convicted accused is not barred from relying on any or all of those factors as mitigating factors. A convicted person can still present any or all of those four factors together with any other factors or circumstances in mitigation. This adds to some of the examples of mitigating factors listed in *Morah Chekwube* that can possibly be considered by the court.

[18] On the same token, whilst all the grounds under the previous s 39(2A) can be offered as mitigating factors, the presence of the first three factors can,

on the other hand, be relied on as aggravating factors by the prosecution in seeking the death penalty, that is:

(a) there was selling and buying of dangerous drugs when the convicted person was arrested;

(b) there was involvement of an agent provocateur; and

(c) the convicted accused's role is more than just mere transporting, carrying, sending or delivering of dangerous drug.

[19] In exercising its duties to determine the appropriate sentence, the court must take cognizance of the fact that although Act 846 does not abolish the death sentence in its entirety, this Act was enacted with the spirit and intention to preserve life. Referring to the Handsard of the second and third reading of the Abolishment of Mandatory Death Penalty Act Bill 2023 dated 11 April 2023 the Deputy Minister of Law stated the following:

> Selain itu, hukuman mati yang telah dilaksanakan juga tidak boleh diperbaiki ataupun dipulihkan, dengan izin Tuan Yang di-Pertua, *you cannot undo the death penalty as it is irreversible*. Oleh itu, kita tidak boleh dengan sewenangnya mengabaikan kewujudan hak asasi untuk hidup ataupun dengan izin, *the inherent right to life* setiap individu. Pemansuhan hukuman mandatori di Malaysia bertujuan menghormati hak untuk hidup setiap individu di Malaysia sambil memastikan keadilan bagi semua pihak.
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> Selaras dengan tujuan menghormati hak untuk hidup bagi setiap individu, prinsip asas di sebalik di setiap hukuman di Malaysia merupakan pemulihan ataupun, dengan izin, *rehabilitation* banduan agar mereka dapat kembali ke masyarakat dan menjadi individu yang dapat berkhidmat kepada keluarga, masyarakat dan negara setelah selesai menjalani hukuman.
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> ...
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> Sehubungan itu, pada 17 Mac 2023, Mesyuarat Jemaah Menteri telah bersetuju dengan cadangan hukuman gantian terhadap hukuman mati mandatoh iaitu hukuman mati atas budi bicara mahkamah atau hukuman pemenjaraan bagi suatu tempoh yang tidak kurang daripada 30 tahun tetapi tidak melebihi 40 tahun dan juga hukuman sebatan tidak kurang 12 kali. Dengan pemberian budi bicara kepada mahkamah dalam menjatuhkan hukuman mati, mahkamah boleh mengambil kira prinsip undang-undang yang terpakai dalam memutuskan sama ada hukuman mati perlu dikenakan, iaitu antara lain terdapat anggapan yang memihak kepada hak seseorang untuk hidup yang tidak terbatas atau, dengan izin, unqualified right to life.
>
> Pertimbangan prinsip seterusnya adalah di mana hukuman mati boleh dikenakan dalam kes-kes yang sesuai dan mahkamah mempunyai peranan untuk menentukan kes-kes yang sesuai tersebut berdasarkan antara lain dahuluan ataupun precedent di dalam kes-kes serupa di negara-negara lain seperti India yang juga telah pun menghapuskan hukuman mati mandatori. Prinsip-prinsip yang harus

dipertimbangkan, termasuk faktor-faktor mitigasi dan pemberatan ataupun, dengan izin, mitigating and aggravating factors. A

[20] Thus, in consideration of the spirit and intent of Act 846, this court holds the view that unless the aggravating factors are exceptionally serious and outweighs the mitigating factors in any particular case, life imprisonment and whipping should be the preferred sentence under s 39B(2). B

[21] On the subject of mitigation under the present law, it would be pertinent to ponder upon and consider the dissenting views of Nallini Pathmanathan FCJ in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147. Although the views expressed there were on the issue of the constitutionality of the mandatory death sentence, the consideration of the degree of culpability in relation to the role played by the convicted accused within the definition of trafficking is now relevant: C D

> [246] A study of the DDA will disclose that the Legislature has enacted the statute with a very wide definition of 'trafficking'. The term encompasses a vast array of activities including '... manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivehng, procuring, supplying or distributing any dangerous drug ...'. E
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> [247] It also makes it an offence for a person to be punished in respect of the trafficking of varying quantities of dangerous drugs. The DDA does not stipulate any minimum quantity of drugs required to establish the offence of trafficking, albeit a statutory minimum weight is stipulated in order to invoke the presumption of trafficking under s 37(da). In other words, in terms of both the range of activities, and the weight of drugs concerned, the ambit of the offence is very wide. F
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> [248] The policy and object of the DDA is clear, namely to put an end to the dissemination of dangerous drugs in the country or to rid the country of this scourge. However, it is equally clear that by very reason of the wide ambit of these statutory provisions, the range of circumstances in which a person is charged and convicted of trafficking diverges greatly. G
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> [249] By way of example, convictions in the court range from persons who are routinely referred to as 'drug mules', who carry relatively small quantities of a proscribed drug, due to impecuniosity, ignorance or desperation to, at the other extreme, persons who strategise, plan and set up drug 'factories' at various hidden locations with a view to 'cooking' or manufacturing huge quantities of a cocktail of drugs, for consumption by large segments of the public, and who earn vast profits from their illicit activities. In between these two extremes are persons who 'traffic' for a variety of reasons with different levels of culpability. H I
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> [250] Notwithstanding these huge disparities in the circumstances of the commission of the offence, the quantity involved and the types of persons involved, they are all grouped together in one large class as 'traffickers' who are all consequently subject to the sole mandatory punishment of death.

[251] With the greatest of respect, it defies common sense to contend, even momentarily, that all these persons who fall within the vast definition of 'trafficking' have been classified, for the purposes of punishment only, on the basis of intelligible differentia, with a rational nexus to the object of the DDA. This is because there is no intelligible criteria for classifying them together for the purposes of imposing the same punishment of mandatory death, save for the purposes of establishing culpability for the offence of trafficking. In other words, while the rationale for classification may have basis for the purposes of establishing 'trafficking' so as to ensure that the wide range of activities are caught, this ought not to extend to punishment, which is a distinct and separable aspect of the crime. As such, it cannot be said that the classification is reasonable in so far as punishment or sentencing is concerned.

[252] The ultimate policy and object of the DDA is to prohibit the spread or perpetration or trading in drugs. To that end, the classification of a wide range of activities to enable the prosecution of all persons involved in the drug trade is tenable. And equally so for the purposes of proving guilt, given the difficulties otherwise involved in establishing the offence of 'trafficking'.

[253] However, to impose the same mandatory extreme and final punishment of death, to all persons falling within that range, lacks any rational basis. The diversity of persons and circumstances, not to mention the quantity of drugs involved, precludes such classification. On the contrary, such an imposition is irrational, arbitrary and capricious.

[254] The imposition of the death penalty as the sole punishment for trafficking, being unreasonable, unjust, unfair and devoid of any rational classification, infringes art 8(1) of the FC.

[22] Taking those views into consideration, the role of a convicted accused in the spectrum of trafficking activities and the mitigating reasons for them must now be considered by the court in determining whether the passing of a death sentence is commensurate with the type of act of trafficking as defined under s 2 of the DDA. That definition cannot now be taken as all-encompassing and one that fits all.

[23] In addition to that, the weight or volume of the dangerous drugs found in the possession of the convicted accused will be another key consideration. A distinction should now be made between cases where the amounts of dangerous drugs involved barely meets the minimum threshold for a presumption of trafficking under s 37(da) of the DDA and those that are greatly in excess of that minimum. An amount that barely meets the minimum threshold or thereabouts should not, in the absence of any heavy aggravating factor, prima facie justify the death sentence.

[24] Thus, having considered all the possible aggravating and mitigating factors and keeping in mind the spirit and intent of Act 846, in this court's view, the death sentence should only be reserved for exceptionally serious cases where the convicted accused:

(a) served a major role in the act of trafficking (see *Letitia Bosman*; *Mohamad Fauzi bin Ridzwan & Anor v Public Prosecutor* [2006] 2 MLJ 15; [2006] 1 CLJ 478);

(b) trafficked in large amounts or quantity of dangerous drugs or greatly in excess of the minimum threshold for the presumption of trafficking under s 37(da) of the DDA (see *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, *Muhammad Lukman bin Mohamad v Public Prosecutor* [2021] 4 MLJ 494; [2021] 7 CLJ 524, *Public Prosecutor v Saifulzainizam bin Mat Nasir* [2021] 5 MLJ 265; [2021] 1 LNS 1074);

(c) was caught in the act of processing or manufacturing dangerous drugs (see: *Chan Wei Loon v Public Prosecutor and another appeal* [2021] 4 MLJ 660; [2021] 6 CLJ 623);

(d) trafficked dangerous drugs that were found individually packed in large amounts, that raises the inference they were meant for selling or distribution (see: *Public Prosecutor v Mohd Fazelan bin Md Khuzeh* [2015] 6 MLJ 688; [2015] 9 CLJ 221);

(e) was caught in the act of selling large amounts of dangerous drugs dangerous drugs;

(f) had in his possession large quantity of paraphernalia for the processing, manufacturing or administration of dangerous drugs (see: *Saifulnizam Mat Nasir*;

(g) was caught giving instructions to others, in particular minors, in the act of processing, manufacturing, selling or distributing dangerous drugs;

(h) used sophisticated methods to conceal, hide or transport dangerous drugs (see: *Wjchai Onprom v Public Prosecutor* [2006] 5 MLJ 415; [2006] 3 CLJ 724, *Bebou Akpo Bouraima lwn Pendakwa Raya* [2017] MLJU 477; [2017] 1 LNS 511);

(i) trafficked in large quantities of chemically processed dangerous drugs or designer drugs (see: *Khairil Anwar bin Abdul Rahim*; *Obieguo Emmanuel Chukwunanu v Public Prosecutor* [2018] 1 LNS 1089; [2018] MLRHU 849);

(j) had in his possession illegal arms or weapons when he was caught;

(k) took life-threatening measures to resist arrest;

(l) had multiple prior convictions; and/or

(m) acted in cohorts with corrupt members of any enforcement agency.

[25] Those factors are merely examples of exceptional aggravating factors that may, in this court's view, justify the death sentence. It would be up to the court to deliberate on and weigh them against all mitigating factors guided by established laws on sentencing (see: *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139, *Pendakwa Raya lwn Ramakrishnan a/l Subramaniam dan lain-lain* [2013] 2 MLJ 549; [2012] 9 CLJ 443, *Public Prosecutor v Aris bin Mohd Nor* [2019] MLJU 1136; [2019] 1 LNS 1555, *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102; and *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70; [2013] 2 CLJ 686) and to find if any one of them or a combination of any number of those factors justify the court's exercise of discretion to pass the death sentence.

DECISION

[26] Therefore, after hearing learning counsel for the convicted accused and the deputy public prosecutor, this court finds that the mitigating factors in favor of passing a life sentence outweighs the aggravating factors. Although the amount of heroin was almost seven times more than the statutory minimum under s 37(da) of the DDA, this court took into account the fact that the convicted accused was not caught in the act of selling dangerous drugs, he acted alone, there was no involvement of an agent provocateur, he was not caught in the act of processing or manufacturing dangerous drugs and he cooperated with the police at the time of arrest. Together with the other mitigating factors and in view of the spirit and intent of Act 846, this dourt finds that this is a case where the exercise of this dourt's discretion to pass a sentence of life imprisonment and whipping of 15 strokes is justified and commensurates with the facts of the offence.

What is life imprisonment?

[27] In the course of submitting on the factors of mitigation, learned counsel for the convicted accused contended that since Act 846 did not make any specific amendment to the meaning of life imprisonment, then the meaning of life imprisonment under s 3 of the Criminal Justice Act which was untouched by Act 846 must apply. The prosecution did not offer a different view on the matter. Nonetheless, for the sake of brevity, it would be opportune for this court to make some remarks on the matter.

[28] Now, whilst Act 846 had made specific changes to the Penal Code, the Firearms (Increased Penalties) Act 1971, the Arms Act 1960, the Kidnapping Act 1961, the Dangerous Drugs Act 1952, the Strategic Trade Act 2010 and

the Criminal Procedure Code on the term of life imprisonment, it did not do the same for s 39B(2).

[29] The DDA does not define the phrase imprisonment for life. The meaning of that phrase is sourced from s 3 of the Criminal Justice Act 1953 (Revised 1988) that provides the term of life imprisonment to be 30 years. The Court of Appeal in *Kannan a/l Rama Chenderan v Pendakwa Raya* [2019] MLJU 1680; [2019] 1 LNS 1938 held:

> [18] The sentence passed by us reflected the intention of Parliament when it amended the period of 'imprisonment for life' in s 3 of the Criminal Justice Act 1953 (Act 345) which was increased from twenty to thirty years vide s 2 of the Criminal Justice (Amendment) Act 2007 (Act A1302). This amendment has been in force since 7 September 2007. Hence, the sentence passed by us was with due consideration of the maximum sentence provided under sub-s 39A(2) of the Act read together with the amended s 3 of the Criminal Justice Act 1953 which is 30 years.

[30] It is indeed remarkable that in amending all those other Acts of law under Act 846 to stipulate that natural life and life imprisonment shall not be less than 30 years and not more than 40 years, there was no effort to do the same to s 39B(2). The merits or otherwise of the legislator's decision on the matter is not the subject of this decision. Moving on, can the new provisions of the Criminal Procedure Code ('the CPC') that now replace references to life imprisonment to be imprisonment of not less than 30 years but not more than 40 years be used as the source for the term for imprisonment for life under s 39B(2)? In this court's view, that cannot be done because the DDA is a special act and the CPC is only a general act on the conduct of criminal proceedings (see *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151, *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285). As expressed by the Court of Appeal in *Kanna Rama*, s 39(2A) which provides for imprisonment for life must be read with s 3 of the CJA. Therefore, it must similarly apply to s 39B(2). In the absence of an amendment to s 3, the term of imprisonment for life therefore remains to be 30 years. The legislators must have had intended for the term of life imprisonment to remain as 30 years as defined in the CJA and not between 30 to 40 years as stipulated in all those amended provisions in Act 846.

[31] In conclusion, the convicted accused is hereby sentenced to imprisonment for life and 15 strokes of whipping under the first conviction. The imprisonment sentence shall run concurrently together with the term of imprisonment under the second, third and fourth conviction from 25 September 2020 which is the date the convicted accused was rearrested after the Court of Appeal allowed the prosecution's appeal against this court's decision to acquit him at the end of the prosecution's case.

A *Accused sentenced to life imprisonment and 15 strokes of whipping for trafficking offence.*

Reported by Ashok Kumar

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